



September 20, 2012

EX PARTE

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Revision of the Commission's Program Access Rules, MB Docket No. 12-68; News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control, MB Docket No. 07-18; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al., MB Docket No. 05-192.

Dear Ms. Dortch:

On September 18, 2012 members of the Coalition for Competitive Access to Content (CA2C)¹ including: Glenn Reynolds, USTelecom; Stacy Fuller, DIRECTV; Bill Wiltshire, DIRECTV/ Wiltshire & Grannis; Steve Pastorkovich, the Organization for the Promotion and Advancement of Small Telecommunication Companies; Jim Smith, AT&T; Jeb Benedict, CenturyLink; Paul Raak, the Independent Telephone and Telecommunications Alliance; Ross Lieberman, the American Cable Association; Alison Minea, and Hadass Kogan, DISH Network; Steven Fravel, the National Telecommunications Cooperative Association; Eric Keber, the Western Telecommunications Alliance; and the undersigned, met separately with Alex Hoehn-Saric and Holly Saurer of Commissioner Rosenworcel's office, Erin McGrath of Commissioner McDowell's office, and Dave Grimaldi of Commissioner Clyburn's office.

During the meeting, CA2C members discussed the policy positions supporting an extension of the cable exclusivity prohibition, and their concerns over reports that the Commission might instead rely upon a combination of the complaint procedures available under Section 628(b) of the Communications Act and the merger conditions imposed on Comcast/NBC Universal.²

¹ The CA2C is a diverse coalition of multichannel video programming distributors (MVPDs) that agree on core program access issues. Its formal members include video providers from the direct broadcast satellite, cable, and telco industries.

² *Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 FCC Rcd. 4238, Appendix A, Section II (2011) ("*Comcast/NBCU Order*").

First, relying on Section 628(b) would be misplaced and would be insufficient to “preserve and protect competition and diversity in the distribution of video programming.”³ Keeping Section 628(b) while discarding the cable exclusivity prohibition would transform the existing regime, in which cable operators have the option to seek a case-by-case determination in favor of exclusivity, into a regime in which competing MVPDs must bring complaints to overturn exclusivity, with all of the cost and delay attendant to such regulatory procedures. CA2C members explained that a case-by-case complaint process would be particularly costly for smaller MVPDs, likely leaving them without a practical remedy at all.

Second, CA2C members emphasized the holes that would be left in the program access regime if the broadly applicable cable exclusivity prohibition is eliminated in the hope that the company-specific *Comcast/NBCU* merger conditions will offer sufficient protection. In particular, they noted that the sole program access remedy available under the conditions imposed in the *Comcast/NBCU* proceeding – commercial arbitration – only applies with respect to programmers controlled by or managed by Comcast or Comcast/NBCU.⁴ Thus, unlike the cable exclusivity prohibition, the arbitration right does *not* apply with respect to (1) programming in which Comcast has an interest but not control or management rights, and (2) programming that is affiliated with other cable operators. Attached hereto is a list of 53 national networks and eight regional sports networks that the *Notice* in this proceeding identifies as affiliated with, but not controlled by, Comcast.⁵ If the rule is allowed to sunset, nothing in the *Comcast/NBCU* conditions would prevent Comcast from entering into exclusive carriage arrangements with those networks.⁶

CA2C members also discussed the connection between access to video programming and broadband deployment. As the Commission has recognized, “a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”⁷ In allocating

³ 47 U.S.C. § 548(c)(5).

⁴ *Comcast/NBCU Order*, Appendix A, Section II. Arbitration is only available with respect to the programming of a “C-NBCU Programmer” (*id.*, Section VII.A.2), defined as Comcast, Comcast/NBCU, any entity directly or indirectly controlling, controlled by, or under common control of Comcast or Comcast/NBCU, and any entity for which Comcast or Comcast/NBCU manages or controls the licensing of video programming (*Id.*, Section I).

⁵ See *Revision of the Commission’s Program Access Rules*, 27 FCC Rcd. 3413, Appendix B, Table 2; Appendix C, Table 2 (2012) (“*Notice*”). For purposes of this *ex parte*, we assume the accuracy of the Commission’s list.

⁶ See *Notice*, ¶¶ 59-66 (discussing potential ambiguity in the applicability of the antidiscrimination provision).

⁷ *Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC

scarce resources, companies must determine whether the expected rate of return from deploying or upgrading broadband facilities is sufficient to justify the investment. The ability to use those facilities to provide video services as well as broadband can make such investment compelling. Conversely, if the availability of video revenues is called into question due to program access concerns, an already challenging value proposition can become even harder to justify, resulting in less investment in broadband. Thus, unfair acts involving video programming “have the potential to limit the ability of MVPDs to provide broadband services, particularly in rural areas.”⁸ The impact of such acts falls particularly hard on small and rural telcos and cable systems, whose potential subscriber base is also likely to have the most limited existing broadband options.

Pursuant to Commission rules, please include this letter in the dockets identified above.

Sincerely,



Kevin G. Rupy
Senior Director, Policy Development

cc: Dave Grimaldi
Alex Hoehn-Saric
Holly Saurer
Erin McGrath
Matthew Berry
Elizabeth Andrion
Lyle Elder
William Lake
Michelle Carey
Mary Beth Murphy
David Konczal
Steven Broeckaert
Jonathan Levy
Kathy Berthot

Rcd. 5101, ¶ 62 (2006), *aff'd sub nom. Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

⁸ *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, 25 FCC Rcd. 746, ¶ 36 (2010).

COMCAST-AFFILIATED NETWORKS NOT SUBJECT TO ARBITRATION CONDITION

National Networks

A&E
A&E HD
Bio
Bio HD
Crime & Investigation
Crime & Investigation HD
History
History HD
History en Español
H2 (formerly History International)
H2 HD
Lifetime
Lifetime HD
Lifetime Real Women
Lifetime Movie Network
Lifetime Movie Network HD
Military History Channel
Current TV
FEARnet
FEARnet HD
MusicChoice
NHL Network
NHL Network HD
Shop NBC
TV One
TV One HD
PBS Kids Sprout
PBS Kids Sprout HD
The Weather Channel
The Weather Channel HD
MLB Network*
MLB Network HD*
iN Demand 1, 2, 3, 4, 5, 6, and 7*
Hot Choice*
Hot Choice HD*
NBA League Pass*
NBA League Pass HD*
MLS Direct Kick*
MLS Direct Kick HD*
MLB Extra Innings*

MLB Extra Innings HD*
NHL Center Ice*
NHL Center Ice HD*
GameHD*
Game2HD*
Team HD*
HDPPV*

Regional Sports Networks

Comcast SportsNet Chicago
Comcast SportsNet Chicago HD
Comcast SportsNet Houston
Comcast Sportsnet Houston HD
SportsNet New York*
SportsNet New York HD*
Comcast/Charter Sports Southeast*
Comcast/Charter Sports Southeast HD*

* Indicates affiliation with additional cable operator(s)

Source: *Revision of the Commission's Program Access Rules*, Notice of Proposed Rulemaking, 27 FCC Rcd. 3413, Appendix B, Table 2; Appendix C, Table 2 (2012).